

International Arbitration

A Preface - Basic Concepts

Presented By:

Matthew J. Weldon

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Roadmap

What is International Arbitration?

Where did IA come from?

How is IA different from litigation?

Why is IA important?

Definition

- Arbitration is an alternative form of dispute resolution where the dispute is submitted to arbitrator(s) for binding decision
 - *No recourse to courts required*
 - *Agreement IS required: consensual process*



“International” Arbitration

- An international arbitration is an arbitration of an “international” dispute
 - A dispute arising out of international contracts / cross-border transactions

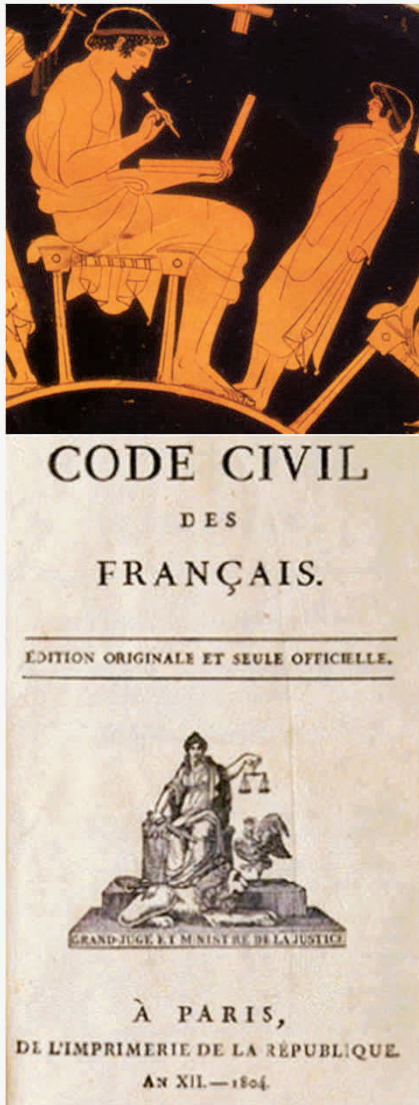
Examples:

- Austrian company builds recycling system for Egyptian steel mill – construction
- Joint venture between Canadian oil company and Venezuelan oil company – energy

Disputes Involving Sovereigns

- International arbitrations are also those arbitrations in which a State or State enterprise may be a party, including:
 - Disputes arising out of contracts with State enterprises
 - Disputes between States (e.g. border disputes)
 - Disputes arising out of treaties – both trade and investment

A (Very) Concise History



- ~600 BCE: Ancient Greece
 - Arbitration among Greek states or towns common.
- ~200 BCE: Roman Empire
 - Arbitration of interstate disputes continues, although Rome never submits to arbitration.
 - Arbitration of private disputes embraced.
- ~17th century: England
 - *Vynior's Case*, 8 Co. 80a and 81b – common law tradition
- ~19th century: Continental Europe
 - Arbitration incorporated into civil code – civil law tradition

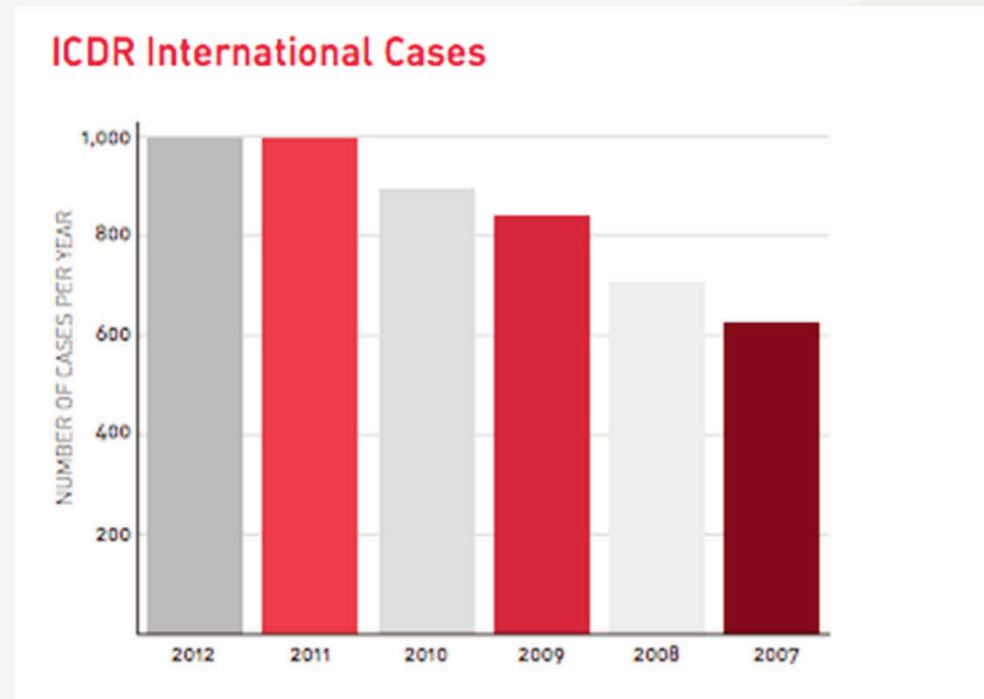
1899 - The Hague

- Permanent Court of Arbitration formed
 - Permanence of arbitration set forth in the Hague Convention of 1899

International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law. Recourse to arbitration implies an engagement to submit in good faith to the award.

Number of Users is Growing

- In 2013 the ICDR administered nearly 1,200 cases



Institutions Multiplying



INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®



NAFTA
Secretariat



ALÉNA
TLCAN



HKIAC 香港國際仲裁中心
Hong Kong International
Arbitration Centre



INTERNATIONAL
CHAMBER
OF COMMERCE



Singapore International Arbitration Centre



THE RESOLUTION EXPERTS®



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION



CHINA INTERNATIONAL ECONOMIC AND
TRADE ARBITRATION COMMISSION



Institutional Arbitration

- In an “institutional arbitration,” a specialized institution takes on the role of administering the arbitration proceeding, e.g., the ICDR.
 - *Offers:*
 - A more formal proceeding
 - Pre-established rules and procedures
 - Administrative assistance
 - Lists of pre-screened arbitrators
 - *Disadvantages...?*

Ad Hoc Arbitration

- Ad hoc arbitration is not administered by and institution
 - Procedure is governed by the applicable law at the seat of the arbitration, if any, when not otherwise stipulated by parties
 - UNICITRAL cases may be *ad hoc*, depending on the relevant arbitration agreement.
 - Usually:
 - *More Flexible and less expensive*

Form of ADR

Litigation

Long / Expensive

- *Backlog of cases*
- *Discovery*
- *Motion practice*
- *Appeals*

Judge

- *Diverse docket*
- *Detached*
- *Judiciary*

Arbitration

Shorter/More Efficient

- *No docket*
- *Goal oriented*
- *Hearing centric*
- *Limited review*

Arbitrator

- *Industry focus/expert*
- *Connected*
- *Colleague*

Form of ADR (Cont'd)

Litigation

Public

- *Record*
- *Trial*
- *Protective Order*

Prescriptive

- *Law*
- *Procedure/Evidence*

Localized

Arbitration

Private

- *Closed*
- *Hearing*
- *Confidentiality*

Flexible

- *Equity*
- *Unconstrained*

Neutral

Motivation – Avoiding...



REPUBLICA BOLIVARIANA DE VENEZUELA
TRIBUNAL SUPREMO DE JUSTICIA



ENFORCEABILITY

New York Convention

- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

-Scherk v. Alberto-Culver, 417 U.S. 506 (1973)

Refusal to Enforce Limited

- In 150+ countries where adopted, refusal of the local court to enforce award is limited to the following seven grounds set forth in Article V of the Convention

Article V(1)(a)

If a party to the arbitration agreement was, under the law applicable to it, under some incapacity; or if the arbitration agreement that the award was based upon was not valid under its governing law

Article V(1)(b)

If a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case

Article V(1)(c)

If the award deals with an issue not contemplated by or covered by the submission to arbitration, or if it contains matters beyond the scope of the arbitration (with the exception that such an award may be enforced to the extent that the objectionable material can be separated from those matters not objectionable)

Article V(1)(d)

If the composition of the arbitral tribunal was not in accordance with the agreement of the parties (or, failing such agreement, the law of the place where the hearing took place)

Article V(1)(e)

If the award has not yet become binding upon the parties, or has been set aside or suspended by a competent authority, either in the country where the arbitration took place, or pursuant to the law of the arbitration agreement

Article V(2)(a)

If the subject matter of the award is not capable of resolution by arbitration

Article V(2)(b)

If enforcement of the award would be contrary to “public policy”

Contact Information

Matthew J. Weldon

277 Park Avenue

New York, New York 10172

+1 212 453 3724

mweldon@cozen.com